No. 85-993

In the Supreme Court of the United States

OCTOBER TERM, 1986

PAULA A. HOBBIE, APPELLANT

v.

UNEMPLOYMENT APPEALS COMMISSION, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF APPEALS OF THE STATE OF FLORIDA, FIFTH DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

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QUESTION PRESENTED

Whether it violates the free exercise clause for a state agency to deny unemployment benefits to someone who loses her job because she refuses to work certain scheduled hours due to sincerely held religious beliefs adopted after she became an employee.

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INTEREST OF THE UNITED STATES

This case involves the validity of a Florida statute which has been interpreted in this case to deny unemployment benefits to someone who lost her job because she refused to work certain scheduled hours due to sincerely held religious beliefs adopted after she became an employee.

The United States has a great interest in the scope given the free exercise clause and the establishment clause of the First Amendment, both of which are at issue here. Questions similar to those in this case were raised last Term in *Bowen* v. *Roy*, No. 84-780 (June 11, 1986); *Goldman* v. *Weinberger*, No. 84-

1097 (Mar. 25, 1986); and *Bender* v. *Williamsport Area School District*, No. 84-773 (Mar. 25, 1986), in which the United States participated as a party or as an amicus. The United States has participated in cases involving the religion clauses from earlier terms as well, either as a party (*e.g.*, *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, No. 83-1935 (Apr. 23, 1985); *United States* v. *Lee*, 455 U.S. 252 (1982); *Harris* v. *McRae*, 448 U.S. 297 (1980); *Tilton* v. *Richardson*, 403 U.S. 672 (1971)) or as an amicus (*e.g.*, *Estate of Thornton* v. *Caldor, Inc.*, No. 83-1158 (June 26, 1985); *Wallace* v. *Jaffree*, No. 83-812 (June 4, 1985)).

STATEMENT

In April 1984, after two-and-one-half years as a trainee and assistant manager of a retail jewelry store, appellant Paula Hobbie informed her manager that she was being baptised into the Seventh-Day Adventist Church and, for religious reasons, would no longer be able to work between sundown Friday and sundown Saturday. Notwithstanding the employer's policy prohibiting management personnel from taking Friday evenings and Saturdays as permanent days-off,[1] the store manager worked out an arrangement with appellant whereby she agreed to work evenings and Sundays and he agreed to work for her whenever she was scheduled to work on a Friday evening or a Saturday. This exchange of shifts occurred several times, though on other occasions appellant worked her scheduled Friday night or Saturday shift (J.A. 2).

[1] The Unemployment Appeals Commission noted in its decision that these are traditionally the heaviest retail sales days (J.A. 2).

On May 28, 1984, after a meeting with appellant and her minister, the general manager advised appellant that she could not be allowed special scheduling privileges. On June 1, 1984, appellant was told that she would either work her scheduled shifts or the company would accept her resignation. When she refused to resign, appellant's employment was terminated.

On June 4, 1984, appellant filed a claim for unemployment compensation with the Florida Department of Labor and Employment Security. Florida law provides (Fla. Stat. Ann. § 443.101 (West Supp. 1986)):

> An individual shall be disqualified for benefits:
>
> (1)(a) For the week in which he has voluntarily left his employment without good cause attributable to his employer or in which he has been discharged by his employing unit for misconduct connected with his work * * *.

Appellant's employer contested the payment of benefits on the ground that appellant had been discharged for misconduct connected with her work,[2] and a claims

[2] Fla. Stat. Ann. § 443.036(24) (West 1981) provides:

> "Misconduct" includes, but is not limited to, the following, which shall not be construed in pari materia with each other:
>
> (a) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his employee; or
>
> (b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

examiner of the Bureau of Unemployment Compensation denied her claim for benefits. On appeal of that determination, following a hearing before a referee, appellee Unemployment Appeals Commission affirmed the denial of the claims (J.A. 5), approving the two-page opinion of the referee holding that appellant's refusal to work scheduled shifts was misconduct connected with her work (J.A. 1-3).

Appellant appealed the Commission's order to the Florida Fifth District Court of Appeals, and that court issued an order stating "PER CURIAM. AFFIRMED." Because, under Florida law, a per curiam affirmance without an opinion cannot be appealed to the state supreme court, appellant appealed directly to this Court.[3]

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant seeks reversal of a judicial order, affirming without opinion an administrative decision which did not discuss the free exercise issue presented here for review. Hers is the extreme claim that any state action having the effect of disadvantaging an individual's choice to adhere to a religious practice must meet the high standards of necessity required for actions which would otherwise violate the Free Exercise Clause. The text and history of the clause as

[3] See Fla. R. App. P. 9.030(a)(2)(A). There was an initial dispute among the parties about whether an appeal was proper under 28 U.S.C. 1257(2). See Mot. to Dis. or Aff. 7-11. The parties now agree that an appeal is proper. Br. for Appellant 8-12; Br. for Appellee 4-6. See *Sherbert* v. *Verner*, 371 U.S. 938 (1962) (noting probable jurisdiction); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 112 (1968 ed.) (appeal lies under 28 U.S.C. 1257(2) even though state court is not explicit in rejection of constitutional claim raised).

well as the general course of this Court's decisions, far from supporting such a theory, suggest a more nuanced approach. Nor should this Court's decision in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), be taken to compel acceptance of appellant's contention.

The text of the free exercise clause, when compared to the speech, press, assembly, petition, and establishment clauses, appears to be directed at precluding a narrower and more focused kind of state action. And the Court's decisions dealing with claims to subsidies for constitutionally protected choices support this inference. Accordingly, we suggest that free exercise claims should generally not be entertained when the state's actions, rather than prohibiting or directly seeking to discourage a religious practice, have an indirect and unintended disadvantaging impact on an individual's choice to engage in a particular religious practice. Even in such cases of indirect disadvantaging, a free exercise claim may be made out, however, if (a) the state's action is not neutral between religious practices, or between religious and other analogous personal choices, or (b) the action bears so heavily on an individual's choice as to have virtually the preclusive effect of a direct prohibition.

This formulation not only harmonizes the general course of the Court's free exercise clause decisions, but also makes the best sense of the relation of that clause to the establishment clause. By recognizing some breathing space for the optional accommodation of religious practice by the state, there is avoided the situation that a particular accommodation is either required by the free exercise clause or forbidden by the establishment clause, with no *tertium quid* in between. This breathing space is desirable for a number of reasons, not the least of which is the danger—

if the two clauses are brought into contact—that a particular state accommodation might appear at different times to be both required and prohibited.

The lack of any explicit attention to these or any constitutional issues in the decisions below denying appellant's claim merits remand by this Court. The state's scheme may, for instance, lack the neutrality which is a necessary if not a sufficient condition for the validity of its denial of benefits here. Nor is it clear what the impact and duration of the denial was in this particular case, a factor which may bear on appellant's constitutional claim even if the state's scheme satisfies the test of neutrality.

ARGUMENT

THE RECORD OFFERS NO SUFFICIENT BASIS ON WHICH TO DETERMINE WHETHER OR NOT APPELLEE HAS PROHIBITED THE FREE EXERCISE OF RELIGION

This case comes to the Court on a record containing virtually no consideration of the free exercise issue which it presents. While appellant's counsel briefly raised the issue at the hearing before the referee of the Unemployment Appeals Commission and both parties briefed the issue before the Florida appellate court, neither the referee's opinion, which was affirmed by order of the commission, nor the state appellate court's per curiam affirmance, touches upon it. As a result, this Court is invited to determine whether appellee has violated appellant's right to free exercise of religion by reference to a record which lacks the critical facts bearing on this issue.[4]

[4] There is nothing in the record, for example, about the way in which Fla. Stat. Ann. § 443.101 (West 1981 & Supp. 1986), and especially the language disqualifying applicants when discharged for work-related misconduct, has been applied in other contexts. There has been no argument and no judicial discussion about whether it has been applied in a nondiscriminatory manner to religious as opposed to nonreligious conduct, or to the conduct of some religions as opposed to others. Nor has there been consideration of the nature and amount of the benefits being denied, of the permanent or temporary duration of the denial, or of any additional consequences attendant to the refusal of benefits. See pages 26-28, *infra*.

A. The Denial Of Benefits Under A Facially Neutral Statute, Without More, Is Not A Prohibition Of The Free Exercise Of Religion

The thrust of appellant's argument—a necessary thrust given the state of the record—is that the state may *never*, absent a compelling interest and no other way of advancing it, deny receipt of benefits under a facially neutral statute where the applicant is ineligible because of performance (or non-performance) of an act prescribed (or proscribed) by his religion. We submit that this theory of the free exercise clause is inconsistent with the language and origins of the clause, and with this Court's decisions under it.

1. The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

To begin with, it is significant that it is not laws "respecting" the free exercise of religion or "abridging" it that are proscribed, but only those "prohibiting" it. And this is a considerably narrower proscription. Abridging means "[t]o reduce or contract" (*Black's Law Dictionary* 8 (5th ed. 1979)) and re-

specting means only "with regard to" (*Webster's Third New International Dictionary* 1934 (1976 ed.)); but prohibit means "[t]o forbid by law; to prevent" (*Black's Law Dictionary* 1091 (5th ed. 1979)).[5] The contrast between the use of "prohibiting" in the free exercise clause and "respecting" or "abridging" elsewhere in the First Amendment indicates that the Framers did not propose identical limits on Congress's authority to enact laws. Thus, while the Framers may have been concerned with a relatively broader array of laws regarding the establishment of religion and assembly and speech, they were troubled in the free exercise clause only with prohibitory laws that forbid or prevent the practice of religion. Consequently, so long as a law does not with relative directness proscribe a religious practice or require behavior contrary to a religious belief, it is not in evident conflict with the express terms of the free exercise clause.

The origins of the clause bear this out. "No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment." *Everson* v. *Board of Education*, 330 U.S. 1, 33 (1947) (Rutledge, J., dissenting). During the early days of the colonies, religious believers were often persecuted and forced to engage in practices which violated their beliefs. Laws were enacted requiring attendance at approved services, expulsion of religious nonconform-

[5] We do not question that "free exercise" means more than mere advocacy or belief; the phrase itself denotes action or activity. Furthermore, if the free exercise of religion were only a right to express religious beliefs, then the clause would be mere surplusage, since that right is already protected by the right to assemble, speak, and publish. See *Widmar* v. *Vincent*, 454 U.S. 263, 269 n.6 (1981).

ists, support for the established church, and imprisonment of those who preached unpopular doctrine. See C. Antieau, A. Downey & E. Roberts, *Freedom From Federal Establishment* 16-29 (1964); L. Pfeffer, *Church, State, and Freedom* 71-90 (1964). "Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated." *Everson* v. *Board of Education*, 330 U.S. at 10 (footnote omitted). It was an abhorrence of such conduct which gave birth to the religion clauses of the First Amendment. *Bowen* v. *Roy*, No. 84-780 (June 11, 1986), slip op. 10 (opinion of Burger, C.J., joined by Powell and Rehnquist, JJ.); *Engel* v. *Vitale*, 370 U.S. 421, 432-433 (1962); *McGowan* v. *Maryland*, 366 U.S. 420, 464 (1961) (Frankfurter, J., concurring); *Everson* v. *Board of Education*, 330 U.S. at 11. In this regard, the Court has repeatedly recognized the role of Thomas Jefferson's Virginia *Bill for Religious Liberty* as an earlier formulation of the ideas embodied in the religion clauses of the First Amendment. *McGowan* v. *Maryland*, 366 U.S. at 437; *Everson* v. *Board of Education*, 330 U.S. at 12-13; *Reynolds* v. *United States*, 98 U.S. 145, 163-164 (1878). It provided in part:

> That no man shall be *compelled* to frequent or support any religious worship, place, or ministry whatsoever, nor shall be *enforced, restrained, molested*, or *burthened* in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief[.]

Act for Establishing Religious Freedom, ch. XXXIV, 1823 Va. Acts 86 (Hening) (emphasis added) (quoted in *Everson*, 330 U.S. at 13). Similarly, James Madison, the Amendment's principal sponsor, described it as ensuring "that Congress should not establish a religion, and enforce the legal observation of it by law, nor *compel* men to worship God in any manner contrary to their conscience." 1 Annals of Cong. 758 (J. Gales ed. 1834) (emphasis added). It was, in short, "the historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause of the First Amendment. See generally M. Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (1978)." *Bowen* v. *Roy*, slip op. 10 (opinion of Burger, C.J.).

Thus, the origins of the First Amendment confirm what is apparent in its language: that only relatively direct prohibiitons of the free exercise of religion are proscribed.

2. Similarly, while this Court has recognized that state actions short of direct prohibitions may violate the free exercise clause, those decisions generally reflect that the language and origins of the clause require something more than a tangential, indirect effect on the practice of religion. The Court has repeatedly focused on the nature of governmental [6] "compulsion" when determining whether a statute, as

[6] The Court has recognized that the religion clauses apply to state as well as federal action through the Fourteenth Amendment. See *McCollum* v. *Board of Education*, 333 U.S. 203 (1948) (establishment clause); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (free exercise clause). The clauses' prohibitions are at least as narrow as applied to the states, however. Cf. *Johnson* v. *Louisiana*, 406 U.S. 356, 369-377 (1972) (opinion of Powell, J.).

applied, violates a religious observer's free exercise rights. See *Bowen* v. *Roy*, slip op. 9-14 (opinion of Burger, C.J.); *Abington School District* v. *Schempp*, 374 U.S. 203, 223 (1963). See also *Wisconsin* v. *Yoder*, 406 U.S. 205, 218 (1972) (noting the presence and significance of compulsion); *Engel* v. *Vitale*, 370 U.S. at 430 (emphasis added) ("[t]he Establishment Clause, unlike the free exercise clause, does not depend upon any showing of *direct governmental compulsion* and is violated by the enactment of laws which establish an official religion whether those laws operate *directly* to coerce nonobserving individuals or not").

The question presented by this case is whether a governmental decision, which has not been shown to be discriminatory in intent but has the unintended effect of creating a financial disincentive to a religious practice, can be said for that reason alone to "prohibit" the free exercise of religion. An affirmative answer proposes an extreme doctrine which is inconsistent not only with the text and intent of the free exercise clause, but the dominant course of the Court's decisions.[7]

a. It is well established that a person is not protected from every incidental burden on the exercise of his religion that may result from the implementation of a neutral, secular governmental interest. "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religious practice itself, would radically restrict the operating latitude of the legislature."

[7] This case thus does not present the issue whether a "prohibitory" law which is neutrally written, motivated, and applied has violated the Free Exercise Clause. See *Wisconsin* v. *Yoder, supra.*

Braunfeld v. *Brown*, 366 U.S. 599, 606 (1961) (plurality opinion). See, *e.g.*, *McDaniel* v. *Paty*, 435 U.S. 618, 635 n.8 (1978) (Brennan, J., concurring); *Johnson* v. *Robison*, 415 U.S. 361, 383-386 (1974); *Gillette* v. *United States*, 401 U.S. 437, 461-462 (1971); see also *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Reynolds* v. *United States*, *supra*.

Thus, for instance, it would seem to be a clear implication of the extreme interpretation of the free exercise clause expressed by appellant ■ that the failure of government to subsidize a constitutionally protected choice is equivalent to placing a forbidden impediment on the exercise of that choice. This has not been the doctrine of this Court, even in cases involving constitutional rights where the limitation on government action is not expressly limited to "prohibitions." For example, in response to a claim that the failure to finance abortions constituted an infringement of that constitutionally secured liberty, the Court stated: "[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." *Harris* v. *McRae*, 448 U.S. 297, 316 (1980). See also *Maher* v. *Roe*, 432 U.S. 464, 474 (1977) (the failure to fund abortions "impose[s] no restriction on access to abortions that was not already there").

Similarly, this Court, in upholding restrictions on the election funds available to minority and new parties during a campaign (*Buckley* v. *Valeo*, 424 U.S. 1, 94-95 (1976) (footnote omitted)), drew a clear distinction between prohibiting the candidate from running for office and merely making the candidacy more difficult by not subsidizing it:

> [T]he denial of public financing to some Presidential candidates is not restrictive of voters' rights and less restrictive of candidates'. Subtitle H does not prevent any candidate from getting on the ballot or any voter from casting a vote for the candidate of his choice; the inability, if any, of minor-party candidates to wage effective campaigns will derive not from lack of public funding but from their inability to raise private contributions.

In short, "[i]t is one thing to say that a State may not prohibit [an activity] and quite another to say that such [activity] must * * * receive state aid." *Norwood* v. *Harrison*, 413 U.S. 455, 462 (1973).

Accordingly, there is a clear difference between interfering with a person's ability to follow his religious beliefs and not providing him with funds to make such activity more comfortable or rewarding. Any other conclusion would go well beyond the plain meaning of the clause's language and any purpose contemplated by the Framers. For instance, the Amish would have not only the free exercise right not to attend public schools, *Wisconsin* v. *Yoder*, *supra*, but also the right to have their own special schools funded at public expense. Conversely, government would not only be foreclosed from prohibiting attendance at religious schools, but would also be required to subsidize them. Cf. *Harris* v. *McRae*, 448 U.S. at 318; *Maher* v. *Roe*, 432 U.S. at 476-477; *Norwood* v. *Harrison*, 413 U.S. at 462; *Thomas* v. *Review Board*, 450 U.S. 707, 724 n.2 (1981) (Rehnquist, J., dissenting).

It might be argued that the situation is different where the state has in place a general program for providing unemployment compensation. But this difference is of significance not with respect to whether

religious *liberty* has been restricted but only with respect to whether government has departed from its mandate of neutrality towards religion. If the question whether religious freedom has been burdened turns on whether an unemployment compensation program exists, then there is no right to government funds as such, but only to those government funds which are provided to others similarly situated. Thus, "manipulation of public benefits produces problems of equality, not freedom." Garvey, *Freedom and Equality in the Religion Clauses*, 1981 Sup. Ct. Rev. 193, 206. See *United States* v. *Lee*, 455 U.S. 252, 263-264 n.3 (1982) (Stevens, J., concurring).

For example, while exempting a religiously-motivated conscientious objector from military service furthers free exercise values, the conscientious objector who is excused from military service would not subsequently have any free exercise claim to veterans' benefits. If other nonveterans are not entitled to such benefits, then it is difficult to discern why a conscientious objector must receive them simply because he is a nonveteran for religious reasons (unless, of course, the state provided veterans' benefits to persons who avoided military service for analogous, but secular reasons). To be sure, the conscientious objector in this situation would be forced to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept [military service], on the other hand." *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963). Nevertheless, when faced with precisely this free exercise claim, the Court in *Johnson* v. *Robison*, 415 U.S. 361 (1974), ruled that the denial of special veterans' benefits to a conscientious objector was constitutionally permissible. In that

case, a conscientious objector who had performed alternative civilian service challenged the federal funding scheme that granted educational benefits only to veterans who had served in active duty on the grounds that this denial of benefits "interferes with his free exercise of religion by increasing the price he must pay for adherence to his religious beliefs" (415 U.S. at 383). The Court rejected this argument in no uncertain terms (*id.* at 385-386) (footnote omitted):

> The withholding of educational benefits involves only an incidental burden upon appellee's free exercise of religion—if, indeed, any burden exists at all. * * * Appellee and his class were not included in this class of beneficiaries, not because of any legislative design to interfere with their free exercise of religion, but because to do so would not rationally promote the Act's purposes. * * * [T]he Government's substantial interest in raising and supporting armies, Art. I, § 8, is of "a kind and weight" clearly sufficient to sustain the challenged legislation, for the burden upon appellee's free exercise of religion—the denial of the economic value of veterans' educational benefits under the Act—is not nearly of the same order or magnitude as the infringement upon free exercise of religion suffered by petitioners in *Gillette*. See also *Wisconsin* v. *Yoder*, 406 U.S. 204, 214 (1972).[8]

Last Term, Chief Justice Burger's opinion in *Bowen* v. *Roy*, *supra* (joined by Powell and Rehnquist, JJ.), drew the same distinction between prohibitory legis-

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[8] Only Justice Douglas dissented. Relying on *Sherbert*, he maintained that "[w]here Government places a price on the free exercise of one's religious scruples it crosses the forbidden line" (415 U.S. at 389 (footnote omitted)).

lation and other laws creating some incentive to compromise religious principles. "[A] mere denial of a governmental benefit by a uniformly applicable statute does not constitute infringement of religious liberty." Slip op. 10. The three Justices emphasized (*id.* at 9-10 (footnotes omitted)):

> It may indeed confront some applicants for benefits with choices, but in no sense does it affirmatively compel appellees, by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons. * * *
>
> * * * [W]hile we do not believe that no government compulsion is involved, we cannot ignore the reality that denial of such benefits by a uniformly applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications.

See also *Bob Jones University* v. *United States*, 461 U.S. 574, 603-604 (1983) ("[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets"); *Braunfeld* v. *Brown*, 366 U.S. at 605-606 (plurality opinion) (the fact that some financial sacrifice is required in order to observe religious beliefs "is wholly different than when the legislation attempts to make a religious practice itself unlawful").

Thus, this Court has repeatedly recognized the distinction between withholding benefits and compelling or prohibiting conduct. It has held with respect to the former that the free exercise clause does not require preferential treatment of religious adherents.

This is not to say that, in an extreme case, the denial of a benefit might not be so onerous that it is tantamount to a prohibition and thus runs afoul of the free exercise clause. But the general principle is sound and well-established.

b. Appellant relies on this Court's decision in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Thomas* v. *Review Board*, 450 U.S. 707 (1981), a subsequent and very similar case which relied heavily on it. Both opinions, particularly *Thomas*, strongly suggested that the government was required to provide unemployment benefits to those who left their jobs or could not find work for religious reasons, even if it did not provide such benefits to persons who left their jobs for analogous secular reasons. An extreme view of these cases would have them impose the obligation on the state, in the name of free exercise, of singling out religious adherents for preferential treatment in the provision of fiscal benefits—at least absent a compelling interest not to do so.

We do not wish to minimize the difficulties which these two cases present for appellee's position here. There is, however, much in *Sherbert* that supports a reading that the opinion was simply intended to enforce government neutrality among religions and between religion and non-religion. First, the South Carolina statute there reflected a sectarian preference because in one part of the statutory scheme Sunday worshippers were expressly exempted from having to make the kind of choice required of Mrs. Sherbert. 374 U.S. at 406. As the Court put it in its discussion of the establishment clause, its holding requiring "extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing

more than the governmental obligation of neutrality in the face of religious differences." 374 U.S. at 409. Moreover, the opinion suggests that if the state had disqualified from unemployment benefits all persons who left their job for personal reasons (religious and nonreligious), then it need not grant a special exemption for those who left for religious reasons. *Id.* at 401 n.4. See *Thomas* v. *Review Board*, 450 U.S. at 723-724 n.1 (Rehnquist, J., dissenting).

Further, the broader interpretation of *Sherbert* urged by appellant would seem to conflict with several other decisions of this Court, and has been expressly rejected by a number of Justices. In *Roy*, for example, the Chief Justice's opinion stated that *Sherbert* and *Thomas* did not constitute a departure from the principle that benefit programs which treat religion evenhandedly need not be supported by a compelling government interest. *Bowen* v. *Roy*, slip op. 14-15. Rather, it was precisely because the individualized "good cause" determinations made in those cases "suggest[ed] a discriminatory intent" and "exhibit[ed] hostility, not neutrality, towards religion" that the compelling governmental interest test was appropriate there. *Ibid.* Similarly, Justice Stevens has suggested that *Sherbert* and *Thomas* provided "protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect." *United States* v. *Lee*, 455 U.S. 252, 263-264 n.3 (1982) (Stevens, J., concurring). "In *Thomas* * * * and *Sherbert* * * *, the granting of a religious exemption was necessary to prevent the treatment of religious claims less favorably than other claims." *Bowen* v. *Roy*, slip op. 7 n.17 (Stevens, J., concurring). In his dissent in *Thomas*, Justice

Rehnquist wrote that *Sherbert* should at most be narrowly read (450 U.S. at 723-724 n.1).

Accordingly, there is considerable ambiguity concerning whether *Sherbert* and *Thomas* stand for the extreme proposition that government must single out religious observers for preferential provision of government benefits not provided to others similarly situated, rather than the more familiar rule that government must be neutral in the provision of such benefits. In our view, for the reasons indicated, the latter interpretation is the proper one.

3. Finally, we note that while we agree with appellee that appellant has failed to demonstrate that the statute at issue here is unconstitutional, we do not agree that the state would be forbidden from accommodating appellant's religious beliefs if it chose to do so. See Br. for Appellee 31-38; Mot. to Dis. or Aff. 21-25. But it is an additional argument against the expansive reading of the free exercise clause urged by appellant that it greatly increases the risk of a collision with the establishment clause.

a. The First Amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * *." While the establishment and free exercise clauses provide two distinct guarantees, they are "correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom." *Everson* v. *Board of Education*, 330 U.S. at 40 (Rutledge, J., dissenting). See also *Abington School District* v. *Schempp*, 374 U.S. at 232 (Brennan, J., concurring).

Nonetheless, there clearly has been a certain "tension between the two Religious Clauses." *Thomas* v.

Review Board, 450 U.S at 719,[9] and, as this Court and its Members have acknowledged, this tension has in difficult cases sometimes led to opinions which are hard to square with one another. *Walz* v. *Tax Commission*, 397 U.S. 664, 668 (1970). See also, *e.g.*, *Widmar* v. *Vincent*, 454 U.S. 263, 282 (1981) (White, J., dissenting) ("[t]he majority's position will inevitably lead to * * * contradictions and tensions between the Establishment and Free Exercise Clauses"); *Thomas* v. *Review Board*, 450 U.S. at 720 (Rehnquist, J., dissenting) ("the decision today adds mud to the already muddied waters of First Amendment jurisprudence"); *Sherbert* v. *Verner*, 374 U.S. at 414 (Stewart, J., concurring) (footnote omitted) ("the Free Exercise Clause will run into head-on collision with the Court's insensitive and sterile construction of the Establishment Clause").[10]

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[9] Commentators have also discussed this tension. See, *e.g.*, Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn. L. Rev. 545, 548-549 (1983); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 674-675 (1980); Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment*, 64 Minn. L. Rev. 561, 567-570 (1980); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3, 15 (1978-1979). See also Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1313-1327 (1970).

[10] Several explanations have been offered for the difficulties in this area. See *Thomas* v. *Review Board*, 450 U.S. at 721 (Rehnquist, J., dissenting) (tension caused by the growth of social welfare legislation, the incorporation of the First Amendment, "and perhaps most important[ly] * * * our overly expansive interpretation of *both* Clauses" (emphasis in original)); *Walz* v. *Tax Commission*, 397 U.S. at 668 ("internal inconsistency in the opinions of the Court derives from * * *

In no context has this tension been more striking than in those instances where the Court has addressed states' efforts to accommodate religion for the purpose of facilitating its free exercise. In this regard, the Court has said that the government must "maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion." *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 788 (1973) (footnote omitted). See also *Lynch* v. *Donnelly*, 465 U.S. 668, 714 (1984) (Brennan, J., dissenting) (the government must "remain scrupulously neutral in matters of religious conscience"); *Abington School District* v. *Schempp*, 374 U.S. at 226; *id.* at 296-299 (Brennan, J., concurring). Yet the Court has sometimes indicated that accommodation of an individual's religious beliefs is mandated by the free exercise clause (see, *e.g.*, *Thomas* v. *Review Board*, *supra*; *Wisconsin* v.

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too sweeping utterances on aspects of these clauses"); *Sherbert*, 374 U.S. at 416-417 (Stewart, J., concurring) (antagonism results from "faliacious fundamentalist rhetoric of some of our Establishment Clause opinions"); McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 1-2 (friction due to inappropriate application of the three-part test in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), and "subsidiary, instrumental, values"); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 686-690 (1980) (disharmony attributable to an overbroad reading of the establishment clause); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3, 15-27 (1978-1979) (inconsistency ensues from a failure to articulate and apply clear constitutional principles); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: The Religious Liberty Guarantee* (pt. 1), 80 Harv. L. Rev. 1381 (1967), *The Nonestablishment Principle* (pt. 2), 81 Harv. L. Rev. 513 (1968) (tension exacerbated by the growth of state regulation).

Yoder, *supra*; *Sherbert* v. *Verner*, *supra*), and other times has said that it is at least desirable (see, *e.g.*, *Lynch* v. *Donnelly*, 456 U.S. at 672-678; *Zorach* v. *Clauson*, 343 U.S. 306, 313-314 (1952)). And where the state has taken the initiative to effect accommodation, its efforts have often been held to violate the establishment clause. See, *e.g.*, *Aguilar* v. *Felton*, No. 84-237 (July 1, 1985); *Estate of Thornton* v. *Caldor, Inc.*, No. 83-1158 (June 26, 1985); *Committee for Public Education* v. *Nyquist*, *supra*. The broader interpretation of *Sherbert* would, in this regard, certainly seem to "impose [a] requirement[] which aid[s] all religions as against non-believers" (*Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961) (footnote omitted)), and would have the "effect" of furthering religion (see *Committee for Public Education* v. *Nyquist*, 413 U.S. at 772-774; *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971)).[11]

b. In our view, a measure of harmony may be achieved in the interpretation of the religion clauses by a rule which holds that states should be free to ameliorate voluntarily the burdens that some of its citizens suffer by virtue of their special religious needs, but is not compelled to do so under the free exercise clause. In broader terms, a state may not promote religion but it may accommodate it.

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[11] We do not suggest that the establishment clause should be interpreted in a way to condemn as "non-secular" the objective of enlarging the scope for individual religious choice, or as "advancing religion" the effect of removing obstacles to religious practice. The creation of a society in which people are free to follow the tenets of their faiths is a truly secular purpose to which many non-believers are devoted. See *Wallace* v. *Jaffree*, No. 83-812 (June 4, 1985), slip op. 16-18 (O'Connor, J., concurring).

This approach is strongly supported by those decisions of this Court under the establishment clause, which "reflect an appropriate accommodation of our heritage as a religious people whose freedom to develop and preach religious ideas and practices is protected by the Free Exercise Clause." *McDaniel* v. *Paty*, 435 U.S. 618, 638 (1978) (Brennan, J., concurring) (footnote omitted). The Court has repeatedly recognized the legitimacy of governmental efforts to accommodate the practice of religion—that is to help create conditions in which citizens are free to decide whether to adopt a religious faith and to practice it if that is their choice. See, *e.g.*, *Lynch* v. *Donnelly*, 465 U.S. at 672-678; *Wisconsin* v. *Yoder*, 406 U.S. at 234-235 n.22; *Widmar* v. *Vincent*, 454 U.S. at 282 (White, J., dissenting). It is well established that it is permissible for states and the federal government, in their discretion, to ease restrictions or burdens that make it difficult for individuals to observe their faith or to expand opportunities for voluntary religious exercise. See, *e.g.*, *Witters* v. *Washington Dep't of Services for the Blind*, No. 84-1070 (Jan. 27, 1986) (extension of aid under state vocational rehabilitation program to finance petitioner's theological training at a Christian college); *Mueller* v. *Allen*, 463 U.S. 388 (1983) (tuition tax deductions); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981) (exemption of church-operated school employees from unemployment taxes); *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979) (implied exemption of church-operated school employees from NLRB jurisdiction); *Gillette* v. *United States*, *supra* (exemption of religious objectors from compulsory military service); *Walz* v. *Tax Commission*, *supra* (property tax exemptions for religious organizations); *Zorach* v. *Clauson*, *supra* (off-

premises public school release time programs); *Quick Bear* v. *Leupp*, 210 U.S. 50 (1908) (use of Indian trust monies for sectarian education). This is not surprising in light of the fact that the First Amendment singles out religious liberty for special protections and "contains a religious classification." *Welsh* v. *United States*, 398 U.S. 333, 372 (1970) (White, J., dissenting).

In defining the boundaries of permissible accommodation, the Court and its Members have in fact emphasized that states are not to be circumscribed by what is constitutionally compelled by the free exercise clause. *Walz* v. *Tax Commission*, 397 U.S. at 673. See also *Wallace* v. *Jaffree*, slip op. 16 (O'Connor, J., concurring); *Marsh* v. *Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting); *TWA* v. *Hardison*, 432 U.S. 63, 90 (1977) (Marshall, J., dissenting); *Gillette* v. *United States*, 401 U.S. at 453; *Abington School District* v. *Schempp*, 374 U.S. at 299 (Brennan, J., concurring); *McGowan* v. *Maryland*, 366 U.S. at 520 (Frankfurter, J., concurring). See generally McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 29-34. Although in *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), and *Gallagher* v. *Crown Kosher Market*, 366 U.S. 617 (1961), the plurality rejected claims that Sunday closing laws impermissibly burdened Saturday religious observers, it was careful, nevertheless, to note that exemptions for persons worshipping on other days "may well be the wiser solution." *Braunfeld* v. *Brown*, 366 U.S. at 608. Similarly, in *United States* v. *Lee*, 455 U.S. at 260-261, the Court referred with apparent approval to the congressionally-granted exemption from self-employment taxes for those with religious objections, while refusing to hold that the Constitution requires extension of that exemption to similarly objecting employees of those persons. Most importantly, in the unemployment benefits context, while there has been disagreement about whether accommodation is required under the free exercise clause, the majority *and* those dissenting have recognized that voluntary accommodation would have been permissible under the establishment clause. See *Thomas* v. *Review Board*, 450 U.S. at 719-720 (quoting *Sherbert*, 374 U.S. at 409); *Thomas*, 450 U.S. at 723 (Rehnquist, J., dissenting); *Sherbert*, 374 U.S. at 422-423 (Harlan, J., dissenting).[12]

[12] The extreme interpretation of *Sherbert* in conjunction with a broad reading of *Estate of Thornton* v. *Caldor, Inc.*, No. 83-1158 (June 26, 1985), can suggest the following view of the Constitution's religion clauses: The state is forced to treat an employer's failure to accommodate an employee's Sabbath observance as an unjustified action for purposes of paying unemployment compensation, but is unable to protect against the ensuing financial drain by treating such a failure as an unlawful employment practice. Put another way, the government may not "burden" an employee's free exercise rights by failing to accommodate his Sabbath observance, yet the same government may be precluded from accommodating all employees' Sabbath observance by the establishment clause. Moreover, as a matter of Title VII law, state employers are seemingly not required under that statute's express "religious accommodation" provision, 42 U.S.C. 2000e(j), to grant in all cases the religion-based "preferences" potentially mandated by *Sherbert*; and it could be argued that the Court has implied that such preferences might even violate the nondiscrimination mandate of that statute. *TWA* v. *Hardison*, 432 U.S. at 84-85. But see *Bowen* v. *Roy*, slip op. 18 n.19 (opinion of Burger, C.J.); *Thornton*, slip op. 2 (O'Connor, J., concurring); *TWA* v. *Hardison*, 432 U.S. at 87-91 (Marshall, J., dissenting).

We submit that this reads *Sherbert* too broadly, for reasons already discussed, and that it reads *Thornton* too broadly as well. In *Thornton*, the Court held that a Connecticut statute which required employers to provide Sabbath observers with an "absolute and unqualified right not to work on whatever day

B. A Remand Is Appropriate Because The Application Of The Florida Statute Has Not Been Explored

That the denial of unemployment benefits does not necessarily infringe on free exercise rights, however, does not mean that this could never be the case. Because the proceedings below did not develop the facts relevant to this issue, indeed because there is no statement or any consideration of the relevant constitutional issues at all, we believe that a remand is appropriate.

The Florida statute appears neutral on its face. It does not by its terms discriminate among religions or against religions generally. Cf. *Bowen* v. *Roy*, slip op. 14 (opinion of Burger, C.J.). As in *Sherbert*, however, it is possible that the statute is applied or interpreted in such a way that certain religions (*e.g.*,

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they designate as their Sabbath" violated the establishment clause. Slip op. 5 (footnote omitted). In reaching its decision, the Court stressed that the Connecticut statute necessarily placed an impermissible burden on employers and fellow workers since it provided no exceptions for special circumstances regardless of the burden or inconvenience resulting from accommodation. As such, the statute created an "unyielding weighting in favor of Sabbath observers" which might require others to " 'conform their conduct to [others'] religious necessities.' " *Id.* at 6-7 (quoting *Otten* v. *Baltimore & O.R.R.*, 205 F.2d 58, 61 (2d Cir. 1953) (L. Hand, J.)).

In contrast, if Florida were to provide unemployment compensation to religious observers, nonobservers would not be required to conform their conduct to accommodate Sabbath observers; the economic burdens which employers would apparently bear would be less onerous than the "absolute" and "unyielding" burden in *Thornton* (see Mot. to Dis. or Aff. 25, citing Fla. Stat. Ann. § 443.131(3)(a) (West Supp. 1986)). Thus, appellee's reliance (see Mot. to Dis. or Aff. 21-25) on *Thornton* is misplaced. See *Thornton*, slip op. 1-2 (O'Connor, J., concurring); see also *Wallace* v. *Jaffree*, slip op. 16-18 (O'Connor, J., concurring).

ones that worship on Sunday) are treated more favorably than appellant's or that religious impediments to continued employment generally are treated less favorably than other personal impediments.[13] It does not appear that either side has considered these issues below, although an examination of the Florida case law reveals this to be a possible issue.[14] Nor, apparently, was there any discussion by the parties of the degree of disincentive provided by the statute to religious practice. As we have said, there may come a point where a disincentive, however neutrally conceived, bears so heavily that it amounts to a prohibition and must be justified by a higher standard of necessity applicable to such prohibitions. As concrete evidence of the statute's application is developed, the tribunals below may identify additional factors of constitutional relevance.[15]

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[13] Appellant concedes (Br. 25) that, "[u]ndeniably, the purpose of the statute is wholly secular: 'to lighten [unemployment's] burden which now so often falls with crushing force upon the uenmployed worker and his family.' Fla. Stat. Ann. § 443.021."

[14] There appear to be no Florida court decisions applying the statutes to other religious claims. Certain secular exemptions, however, have been allowed by the courts. See *Langley* v. *Unemployment Appeals Comm'n*, 444 So.2d 518 (Fla. Dist. Ct. App. 1984) (failing to follow orders because of family emergency not misconduct); *Parker* v. *Department of Labor & Employment Security*, 440 So.2d 438 (Fla. Dist. Ct. App. 1983) (employee absent because he was in jail granted benefits); *Hartenstein* v. *Florida Dep't of Labor & Employment Security*, 383 So.2d 759 (Fla. Dist. Ct. App. 1980) (absence for funeral not misconduct).

[15] We have supported a remand in a case involving a similar issue under Title VII in *Ansonia Board of Education* v. *Philbrook*, cert. granted, No. 85-495 (Jan. 21, 1986). We have sent that brief to counsel for the parties in the present case.

If this Court clarifies the scope and validity of *Sherbert* and *Thomas* along the lines suggested in this brief, then a remand should follow. The parties have not had the opportunity to explicate the interpretation and application of Florida law. That explication would certainly bear on the statute's constitutionality. See *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, No. 85-488 (June 27, 1986), slip op. 5-9 (applying abstention doctrine in free exercise clause challenge to state law); *City of Los Angeles* v. *Preferred Communications, Inc.*, No. 85-390 (June 2, 1986), slip op. 6 (declining to resolve free speech claim "without a fuller development of the disputed issues in the case"); *Bowen* v. *Roy*, slip op. 8 (Stevens, J., concurring) (supporting remand where record was inadequate on other statutory exceptions).

CONCLUSION

For the foregoing reasons, the judgment of the court below should be vacated and the case should be remanded.

Respectfully submitted.

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